

At oral argument the parties agreed that ALJ Belden disallowed claimant's attorney fees for the following entries listed in Claimant's Exhibit 1 to the October 11, 2012, Motion Hearing transcript: December 19, 22, 27, and 28, 2011; the first entry of 60 minutes on December 29, 2011; January 4, 5 and 17, 2012; and both entries on January 12, 2012. Those entries total 510 minutes, or 8.5 hours. Thus, the parties agreed ALJ Belden should have ordered that claimant be paid \$150 per hour for 11.5 hours, not 11.8 hours (20 hours of legal services requested by claimant, minus 8.5 hours disallowed by ALJ Belden equals 11.5 hours). The parties agreed that ALJ Belden disallowed claimant's January 5, 2012, mileage expenses of \$78.15.

The parties also agreed that the ALJ's refusal to grant respondent's motion for continuance is no longer an issue.

ISSUES

At the October 11, 2012, motion hearing, claimant requested respondent pay costs of \$234.45 and 20 hours of attorney fees at the rate of \$250 per hour.

In the October 12, 2012, Order, ALJ Belden determined that \$150 per hour was a reasonable hourly rate for legal services rendered by claimant's attorney in defending respondent's application for review and modification. He disallowed claimant's attorney fees for services rendered in conjunction with the deposition of witness Amanda Fisher and responding to fraud and abuse allegations against claimant. ALJ Belden awarded claimant only \$156.30 for costs.

Claimant contends ALJ Belden erred in excising a number of hours from a statement of time and expenses provided by claimant's counsel. Claimant's counsel asserts he is entitled to at least \$200 per hour for post-award attorney fees. Claimant's attorney also contends he should be paid for all legal services rendered and expenses incurred in association with the deposition of witness Amanda Fisher that was scheduled, but never taken, and in responding to fraud and abuse allegations against claimant. Claimant requests the October 12, 2012, Order be reversed and remanded to ALJ Belden for an award of fees as requested, including those necessitated by this appeal.

Respondent requests the Board affirm the October 12, 2012, Order.

The issues before the Board on this appeal are:

1. Did the ALJ err by finding that \$150 per hour is a reasonable hourly rate for the representation of claimant in a post-award matter?
2. Did the ALJ err by disallowing claimant's attorney fees rendered and expenses incurred in conjunction with the deposition of witness Amanda Fisher and responding to fraud and abuse allegations against claimant?

FINDINGS OF FACT

After reviewing the record and considering the parties' arguments, the Board finds:

Respondent asserts it provided information to claimant's counsel on November 10, 2011, that claimant had become employed by Dillons in Lawrence, Kansas, and attached an authorization for claimant to sign so that claimant's employment records could be obtained from Dillons. On November 14, 2011, respondent filed an Application for Review

and Modification seeking a reduction in claimant's workers compensation payments because claimant was employed and receiving income.

Claimant refused to stipulate into the record an affidavit executed by Amanda Fisher, wage custodian for Kroger, Dillons' parent corporation. Attached to Ms. Fisher's affidavit was a document containing claimant's wage record while employed at Dillons. Claimant's counsel insisted on taking Ms. Fisher's deposition, because claimant's counsel allegedly was uncertain if Ms. Fisher was the wage custodian for Dillons. Respondent asserted this was a delaying tactic so that claimant would continue receiving disability payments. Claimant's counsel asked respondent's attorney if Ms. Fisher's deposition could be taken by telephone, as her office was in Hutchinson, Kansas. However, respondent's attorney refused to grant that request.

Claimant then filed a motion to take Ms. Fisher's deposition by telephone. On December 30, 2011, respondent's attorney filed a pleading entitled, "Suggestions in Opposition to Claimant's Motion for Order Permitting Counsel to Appear at Deposition [of] Witness by Telephone." Attached to the pleading were two exhibits showing claimant's earnings when she worked at Dillons. A hearing on claimant's motion to take Ms. Fisher's deposition was held on January 5, 2012, in Overland Park, Kansas. In a January 6, 2012, Preliminary Decision, ALJ Marcia L. Yates granted claimant's motion to take Ms. Fisher's deposition by telephone.

Ms. Fisher's deposition was scheduled for January 12, 2012. Claimant's attorney called Ms. Fisher to participate in her deposition, only to learn the deposition had been cancelled.

Respondent's Application for Review and Modification was set for hearing on February 1, 2012, in Overland Park. According to claimant's brief to the Board, after traveling from Topeka to Overland Park, claimant's attorney learned the hearing was mistakenly set on a prehearing docket and no court reporter was available. Consequently, the hearing did not proceed. According to claimant's attorney, he later discovered that respondent had abandoned its Application for Review and Modification. Respondent indicated in its brief to the Board that the Application for Review and Modification was abandoned for economic reasons.

At the October 11, 2012, motion hearing for attorney fees, respondent proffered that after claimant's accident and leaving respondent's employment, claimant was employed by Dillons from May 14 through November 5, 2011. Respondent asserted claimant's employment at Dillons precluded her from receiving workers compensation benefits based upon work disability. Respondent claimed that shortly after filing its Application for Review and Modification, it provided claimant's wage information from Dillons/Kroger to claimant's counsel. According to respondent's attorney, claimant's counsel knew of claimant's employment and wages at Dillons, but refused to agree to a suspension of workers compensation payments based upon claimant's work disability. Respondent's attorney

alleged claimant's counsel should not be paid for providing legal services to stall and avoid bringing the post-award review and modification to hearing.

At the October 11, 2012, motion hearing, claimant introduced a statement of attorney fees and expenses incurred from November 10, 2011, through October 11, 2012 (Claimant's Exhibit 1). The statement included 1,200 minutes of attorney fees at the rate of \$250 per hour plus \$234.45 for mileage and tolls, for a total of \$5,234.45.

Roger Fincher, an attorney from Topeka, testified on behalf of claimant at the October 11, 2012, motion hearing. Mr. Fincher testified that 50 percent of his law practice is devoted to workers compensation law. Mr. Fincher annually provides legal representation in 500 to 1,000 workers compensation claims. He practices primarily in northeast Kansas, including Overland Park, Kansas. Mr. Fincher testified that in post-award litigation, he requests \$250 per hour for his services, as that is the rate for similar legal work in the locale. Mr. Fincher has spoken to other lawyers and most of them attempted to charge \$250 per hour for their services. Mr. Fincher testified he is a member of the Kansas Association for Justice "Listserve," where he has seen discussions on attorney fees. He believed \$250 per hour was a reasonable rate. Mr. Fincher indicated he has seen higher and lower hourly rates than \$250 per hour charged by attorneys.

On cross-examination, Mr. Fincher acknowledged that he represents claimants in workers compensation claims and takes claims on a contingency fee basis. He has, however, charged an hourly rate in workers compensation death cases. Mr. Fincher has never represented an employer or an insurance carrier in a workers compensation claim. He did not know if any of the attorneys actually charged their clients \$250 per hour.

Claimant's counsel, Mr. Taff, testified that in bankruptcy litigation and estate matters, he charges \$200 per hour by written contract for legal services. He indicated that legal services in post-award workers compensation litigation are always provided on an hourly basis and that \$250 per hour is reasonable. Mr. Taff confirmed his contract with claimant was for a contingency fee and did not set forth an hourly rate.

After being cross-examined by respondent's counsel, Mr. Taff was questioned at length by ALJ Belden regarding some of the entries on Claimant's Exhibit 1. Mr. Taff admitted that the second entry on January 12, 2012, and the entry for January 17, 2012, were for legal services rendered in conjunction with a fraud and abuse complaint filed against claimant. Mr. Taff testified that the legal services he rendered on December 19, 22, 27, and 28, 2011; the first entry on December 29, 2011; January 4 and 5, 2012; and the first entry on January 12, 2012, pertained to taking the deposition of Amanda Fisher, the wage record custodian for Kroger.

Claimant testified that she went through orientation at Dillons on May 14, 2011. An affidavit from Ms. Fisher¹ indicated claimant received wages from Dillons for pay periods from May 14, 2011, through November 5, 2011.²

In his October 12, 2012 Order, ALJ Belden stated:

Although Claimant's counsel had information pertaining to Claimant's actual earnings at the time the application for review and modification was filed, see *Claimant's Exhibit 1*, p.1, Claimant's counsel was not agreeable to the wage information being submitted voluntarily and required the setting of the deposition of the wage records custodian of Claimant's employer Amanda Fisher.³

On Claimant's Exhibit 1 to the October 11, 2012, Motion Hearing transcript (claimant's Statement of Time and Expenses), an entry dated November 15, 2011, states "Review Notice of Application for Review and Modification; calculate earnings at Dillons; 30 Min."

In his Order, ALJ Belden indicated that on February 1, 2012, a conference was held on respondent's Application for Review and Modification. At the conference, the admissibility of Kroger's records and Ms. Fisher's affidavit were discussed. Subsequent to the conference, respondent discontinued the review and modification proceedings as claimant's award had been paid in full. ALJ Belden ordered respondent to pay 11.8 hours of claimant's attorney fees. ALJ Belden disallowed claimant's attorney fees for services rendered in conjunction with Ms. Fisher's deposition that never took place. ALJ Belden also disallowed attorney fees for services provided in defending fraud and abuse allegations against claimant.

ALJ Belden found that pursuant to K.S.A. 44-536(g), claimant was entitled to attorney fees at the rate of \$150 per hour, the reasonable and customary charges in Overland Park. The ALJ discounted Mr. Fincher's testimony by commenting that Mr. Fincher's office is not based in Overland Park and he does not regularly charge clients an hourly fee. In his Order, ALJ Belden stated:

The Appeals Board previously denied requests for a post-award attorney fee of \$250.00 per hour in the Overland Park, Kansas locale, and affirmed an hourly fee of \$150.00 per hour as reasonable, see *Lopez v. General Motors Corp.*, Docket No. 1039530, p.4 (W.C.A.B. 2009); *Wallis v. Ideker, Inc.*, Docket No. 1007527, p.5 (W.C.A.B. 2008), as well as in other locales. See *Finney v. Finn's Electric Co. Inc.*,

¹ Amanda Fisher's affidavit indicates she executed the affidavit on January 11, 2012. However, the notary public who notarized the affidavit, Staci Fisher, attested the affidavit was signed on January 11, 2011.

² M.H. Trans. (Oct. 11, 2012), Resp. Ex. A.

³ ALJ Order (Oct. 12, 2012) at 1.

Docket No. 216317, p.3 (W.C.A.B. 2010); *Henderson v. United Parcel Service*, Docket No. 1016715, pp. 2-3 (W.C.A.B. 2007).⁴

ALJ Belden also disallowed claimant's expenses of \$78.15 for appearing at the January 5, 2012, motion hearing to take Ms. Fisher's deposition by telephone.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-536(g) provides:

In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, an application for penalties or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of disability compensation, the attorney fees shall be paid from such amounts of disability compensation. If such services involve no additional award of disability compensation, but result in an additional award of medical compensation, penalties, or other benefits, the director shall fix the proper amount of such attorney fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for compensation pursuant to K.S.A. 44-567 and amendments thereto, to the extent of the liability of the fund. If the services rendered herein result in a denial of additional compensation, the director may authorize a fee to be paid by the respondent.

There was no written agreement between claimant's attorney and claimant wherein claimant's counsel agreed to charge claimant an hourly fee for legal services rendered in defending respondent's application for review and modification. From the record, it is unknown if claimant was aware her counsel was charging \$250 per hour for his post-award legal services. The Board finds that problematic, as claimant's counsel appears to have arbitrarily decided \$250 was what he would charge for post-award legal services.

The testimony of Mr. Fincher and Mr. Taff that \$250 is a reasonable hourly fee is unpersuasive. In the past, the Board has held that \$150 per hour is a reasonable attorney

⁴ *Id.* at 3.

fee for representing claimants in post-award proceedings.⁵ The Board would note that the hourly rate should be based upon what a claimant's attorney would charge his or her client and not the hourly rate customarily paid by a respondent or insurance carrier to its attorney. Mr. Fincher testified that in post-award matters, he requests \$250 per hour, but never testified that he was awarded \$250 per hour. Mr. Taff did not testify that he had ever been awarded \$250 per hour for representing a claimant in a post-award matter.

The Board finds that claimant is awarded 11.5 hours of attorney fees at the rate of \$150 per hour. ALJ Belden correctly disallowed any fees for services rendered by claimant's attorney associated with the deposition of Ms. Fisher or defending fraud and abuse allegations against claimant.

Claimant's counsel, without sufficient justification, refused to stipulate to claimant's wage information provided by Dillons/Kroger and insisted that Ms. Fisher's deposition be taken. Neither Kroger nor Ms. Fisher had any reason to inaccurately report claimant's wages while working at Dillons. Unhappy with the unbending stance of claimant's counsel, respondent's attorney, also without sufficient justification, insisted that Ms. Fisher's deposition be taken in person. Instead of complying and traveling from his office in Topeka to Hutchinson to take Ms. Fisher's deposition, claimant's attorney chose to file a motion to take Ms. Fisher's deposition by telephone. That necessitated claimant's attorney to travel from Topeka to Overland Park on January 5, 2012, to appear at the motion hearing to take Ms. Fisher's deposition by telephone. According to claimant's counsel, after he prepared for Ms. Fisher's deposition, it was cancelled without notice. This needless chain of events, created solely by respondent's and claimant's attorneys, caused additional and unnecessary work for the administrative judges, additional expense and undue delay.

CONCLUSION

Claimant is entitled to 11.5 hours of attorney fees at the rate of \$150 per hour in the amount of \$1,725 and \$156.30 in costs, for a total of \$1,881.30.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁶ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

⁵ *Finney v. Finn's Electric Co., Inc.*, No. 216,317, 2010 WL 3489633 (Kan. WCAB Aug. 31, 2010); *Mills v. Express Communications*, No. 1,021,634, 2009 WL 1314313 (Kan. WCAB Apr. 24, 2009); *Lopez v. General Motors Corporation*, No. 1,039,530, 2009 WL 1314329 (Kan. WCAB Apr. 13, 2009); *Wallis v. Ideker, Inc.*, No. 1,007,527, 2008 WL 2354911 (Kan. WCAB May 29, 2008).

⁶ K.S.A. 2012 Supp. 44-555c(k).

WHEREFORE, the Board modifies the October 12, 2012, Order entered by ALJ Belden by finding respondent and its insurance carrier shall pay to claimant 11.5 hours of attorney fees at the rate of \$150 per hour in the amount of \$1,725 and \$156.30 in costs, for a total of \$1,881.30. The October 12, 2012, Order entered by ALJ Belden is affirmed in all other respects.

IT IS SO ORDERED.

Dated this ____ day of May, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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William G. Belden, Administrative Law Judge